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Supreme Court of the United States

OCTOBER TERM, 1928.

No. [redacted] 21

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

vs.

NICK MIRAS.

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner.

DAVID E. LEARY,
WILLIAM G. WIRE,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 619.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

NICK MIHAS.

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner.

This case is here pending on a writ of certiorari, awarded on the 25th day of February, 1929, to a final judgment of the Appellate Court of Illinois, First District, entered on June 20, 1928 (R. 2); rehearing entertained, but denied, on July 5, 1928 (R. 2); and in which a petition for a writ of certiorari, filed in the Supreme Court of Illinois, September 6, 1928, was denied without opinion, on October 23, 1928 (R. 226).

The petition for a writ of certiorari was filed in this Court on the 10th day of January, 1929.

It was an action based upon the Federal Employer's Liability Act in which there were a verdict and judgment against petitioner (the defendant) in favor of Nick Mihas (the plaintiff) for $20,000 damages.

JURISDICTION

The jurisdiction of this court under Sec. 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 St. 937 (U. S. C. Sec. 344) to review the final judgment of the state court is clear (*Chicago, etc. R. Co.* v. *Coogan*, 271 U. S. 472, 474).

It was argued, however, in opposition to the petition for a writ of certiorari, that petitioner did not exhaust its remedy under the state law, and consequently did not obtain the judgment of the highest court of the state in which a judgment could have been had.

The argument is that petitioner failed to make application to the Appellate Court of Illinois for a certificate of importance and an appeal as provided for in subdivision (1) of Par. 120, Sec. 121, Ch. 110, Cahill's Rev. St. of Ill. 1927 (quoted in appendix), which would have entitled petitioner to have the case reviewed by the Supreme Court of the State, it is said, "as a matter of right," whereas by the method adopted (a petition for a writ of certiorari under subdivision (2) of the act) review by the Supreme Court was gracious or discretionary.

Under the Act, the judgment of the Appellate Court in a case like this is final except that under subdivision (1) the Appellate Court "on petition of parties to the cause" may grant appeals to the Supreme Court in matters deemed by it to be important, by the method therein provided, and under subdivision (2) the Supreme Court may re-

quire, by certiorari or otherwise, "any such case to be certified * * * for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court."

The method of review set out in subdivision (2) is thus an alternative one giving the "same power and authority" and having "like effect as if it had been carried by appeal or writ of error to the Supreme Court."

Compare *La Monte* v. *Kent*, 253 Ill. 230, 97 N. E. 387; *Rizzo* v. *Catholic Order of Foresters*, 274 Ill. 91, 113 N. E. 104 (cases construing earlier act).

While it is doubtless true that the review by the Supreme Court under subdivision (2) is discretionary, in that the writ is not awarded "as a matter of right," yet its power and authority over the cause was the same as if there had been an appeal awarded by the Appellate Court under subdivision (1), and thus, by this proceeding, there was obtained in the cause the judgment of the Supreme Court of Illinois—the highest court of the state in which a judgment could be had.

This view is confirmed by Par. 121, Sec. 122, (quoted in appendix) providing for the re-examination by the Supreme Court of cases "brought to it by appeal or certiorari" as to questions of law only.

The writ of certiorari was awarded here to the Supreme Court of the State and the Appellate Court, in the alternative. Ordinarily it would appear that the writ should be awarded to the Appellate Court—the limit of time for making the application for the writ running from the time the writ of certiorari was refused by the Supreme Court (*American Railway Express Co.* v. *Levee*, 263 U. S. 19)—

but the question as to how the writ should run is doubtful here since the record is certified by the Supreme Court, and this Court is not assisted by any decision of the Supreme Court of the State on the subject. Hence, out of abundant caution, a writ in the alternative was prayed for and allowed.

STATEMENT OF PROCEEDINGS

This action was brought in the Superior Court of Cook County, Illinois, by the respondent, Nick Mihas, to recover damages for injuries sustained while in the employ of petitioner as a section hand, engaged in interstate commerce. It was based upon the Federal Employer's Liability Act (R. 5-6).

At the close of the plaintiff's case in the trial court (R. 125) and again at the conclusion of the taking of the evidence (R. 211) petitioner moved for a directed verdict in its favor, which motion was denied. Petitioner also objected to and moved to exclude certain evidence deemed objectionable, and which will be hereinafter referred to (R. 125). The objection and motion were overruled. The jury, after having been instructed by the court—all of the instructions on behalf of the plaintiff being objected to by the defendant (R. 219)—found a verdict for the plaintiff for $20,000 damages. Motions of the defendant for a new trial and in arrest of judgment being overruled, judgment was rendered for the plaintiff on April 16, 1927 (R. 48). Thereupon an appeal was awarded to the Appellate Court, First District (R. 48).

That court affirmed the judgment on June 20, 1928 (R. 2) for reasons stated in its opinion (R. 5-12).

Thereafter the proceedings were as hereinbefore set out.

SPECIFICATIONS OF ERROR

The judgment in this case has been awarded and affirmed against the petitioner under an erroneous interpretation of the Federal Employers' Liability Act as applied to the facts in this case, in the following particulars:

1. Error in denying defendant's motion for a directed verdict on the ground that the plaintiff failed to prove his cause of action for right of recovery under the Act.

2. Error in denying defendant's motion for a directed verdict, made at the close of all of the testimony, on the ground that under all the evidence in the case no negligence on the part of the defendant was proved.

3. Error in denying defendant's motion for a directed verdict for the reason that under the Act the plaintiff assumed all risk of injury to himself in attempting to pass over or between the freight cars, resulting in his injury.

4. Error on the part of the trial court in admitting improper evidence on behalf of the plaintiff over the objections of the defendant, and failure to strike out this evidence on the motion of the defendant.

5. Error on the part of the Appellate Court of Illinois, First District, in affirming the judgment of the trial court, and of the Supreme Court of Illinois in denying defendant's petition for certiorari.

STATEMENT OF FACTS

The injury to Mihas occurred on March 16, 1927, at about ten minutes to seven o'clock in the morning, in the defendant's yards at Peru, Indiana (R. 95). The tracks in these yards ran in an easterly and westerly direction, bounded on the north by Canal Street and on the south by Wabash River. There were five tracks in the yard, the main track, and switching lead and three house or team tracks. The northerly track was team track number 3, on which the accident occurred. About twenty-five feet north of this team track there was a small house, in which the plaintiff lived, furnished to him by the company rent free (R. 128-130). Mihas had been in the employ of the company for fourteen years, and had lived in the house alongside of the team track for about four years prior to the date of the accident. He used a small speeder car, operated by hand, in going up and down the defendant's line to perform his duties in caring for the switch lamps and lights along the right of way. This speeder car was usually located, as it was on this occasion, in an old box car on the south side of the yards and it was necessary for Mihas to cross the tracks in order to get to it (R. 92).

Mihas testified that when he came out of the back door of his house to start to work he looked to one side and the other and did not see or hear any train or shifting cars. He went directly therefrom and, in order to cross the yard to get his speeder car, attempted to climb over a coal car standing with other cars on team track number 3 (R. 96), at a point where there was no established crossing, and just at that moment a string of nine cars which had been switched in on the team track struck the standing cars, causing Mihas to fall between the cars (R. 97), with the result that his arm was crushed and afterwards amputated.

Mihas obviously could have crossed the tracks at other points without the necessity of climbing over or going between the standing cars, though doubtless not so conveniently (R. 117, 118, map opposite p. 128, 128, 129, 146).

This switching operation was effected by what is called a "flying switch"—that is, the engine was cut loose from the cars after a sufficient momentum had been obtained, then ran along the main track, while the string of cars following were shunted on team track number 3 (R. 190-191). Although there was testimony that the impact from the moving car striking those at rest was quite severe (R. 70-71) the speed of the cars when shunted was no more than four or five miles per hour, the usual speed for that operation (R. 177, 196, 198). Those making the switching movement had no knowledge of the presence or movements of Mihas (R. 177, 195). He had no regular time for beginning his work (R. 91). It was customary for switching to be done on these tracks at the time of day the injury occurred—a custom with which Mihas was familiar (R. 111-112).

Among the cars standing on team track number 3 was a loaded coal car from which some men had been unloading coal shortly prior to the switching movement. There was testimony upon which plaintiff's case was based, admitted over defendant's objection, to the effect that it was customary for trainmen to notify persons unloading freight from the cars liable to be affected when a switching movement of the character made here was contemplated (R. 59, 72-73), though it did not appear that the men who had been unloading coal were in any danger at the time of the switching movement here—they had already ceased unloading and were moving away with their truck (R. 57, 70, 75, 101, 112, 113). This customary warning was exclusively for persons engaged in unloading cars and not for employes (R. 64, 166-167). There was

no such notice given in this instance and Mihas who had observed these men in the act of leaving, states he heard no such notice given and relied upon that as justifying his course in attempting to climb over the car (R. 98-99) though he made no inquiry nor was he otherwise advised as to whether or not these men had been in fact notified or warned (R. 113, 116).

OPINION OF THE APPELLATE COURT

The Appellate Court, in the course of its opinion (R. 5-12), said (R. 10):

> "So far as the public is concerned, and by that we mean people dealing with the defendant in unloading cars at the point in question, we are fully of the opinion that the flying switch, without any warning to those so engaged was a negligent operation. It is urged by counsel for defendant that this may be true, in so far as the public is concerned, but that it owed no duty to the plaintiff and that, even though there may have been a custom to warn teamsters, there was no obligation to warn plaintiff, as he was an employee of the defendant and not entitled to the same warning to which the public was entitled. It is urged that the trial court, in permitting evidence as to this custom was in error. We cannot agree with this contention. * * *."

After citing certain Illinois cases in support of its conclusions, the court continued (R. 12):

> "We have examined the cases cited by counsel in support of their contention, but are of the opinion that the general rule in this state, seems to be that an employee is entitled to consider the rules and customs of his employer in governing his conduct while upon his employer's premises and has a right to rely upon

the observance of such rule or custom by his employer as well as the general public would have such a right, and that the jury had a right to consider the fact that there was such a custom in force in the yards of the defendant company, where the accident occurred, in arriving at the questions as to whether or not the plaintiff, at the time of the accident was, himself, in the exercise of due care for his own safety."

It is thus seen that the judgment of the trial court was sustained mainly, if not solely, upon the ground that the custom referred to enured to the benefit of Mihas.

SUMMARY OF ARGUMENT

The holdings and decisions complained of are believed to have been erroneous for the folowing reasons:

(1) The failure to give Mihas notice or warning of the switching movement was not negligence as to him and he assumed the risk thereof (*Aerkfetz* v. *Humphreys*, 145 U. S. 418; *Toledo, etc. R. Co.* v. *Allen*, 48 Sup. Ct. 215);

(2) The making of the "flying switch" was not negligence as to Mihas (*Toledo, etc. R. Co.* v. *Allen, supra*); and

(3) Even if there were a duty to give notice or warning of the switching operation to others differently situated from Mihas, a breach of that duty was not as to him actionable (*St. Louis, etc. R. R.* v. *Conarty*, 238 U. S. 243; *Chesapeake and Ohio R. Co.* v. *Nixon*, 271 U. S. 218).

ARGUMENT

(1)

The failure to give Mihas notice or warning of the switching movement was not negligence as to him, and he assumed the risk thereof.

The plaintiff had been, for a number of years, thoroughly familiar with the manner of the switching operations in these yards (R. 111-112). The employes of the defendant had no reason to anticipate or believe the plaintiff was in or about the cars, or would subject himself to danger in attempting to cross over or between cars (R. 177, 193). Under these circumstances it was not incumbent upon the defendant to give him notice or warning of the switching movement, and in attempting to pass between the cars under the circumstances, the plaintiff assumed the risk of the danger incident thereto.

In *Toledo, etc. R. Co.* v. *Allen,* 48 Sup. Ct. 215, *supra,* this court, through Mr. Justice Butler, said, at page 217:

> "And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkfetz* v. *Humphreys, supra.*
>
> "In any event plaintiff assumed the risk. He was

familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

Chesapeake, etc. R. Co. v. *Nixon,* 271 U. S. 218;
Aerkfetz v. *Humphreys,* 145 U. S. 418;
Davis v. *Phila., etc. R. Co.,* 276 Fed. 187;
Hines, Dir. Gen. v. *Jasko,* 266 Fed. 336;
Connelley v. *Penn. R. Co.,* 228 Fed. 322.

It was argued in opposition to the petition that the defense of assumption risk is not subject to review here since it was not assigned as error in either the Appellate Court or the Supreme Court.

This is a mistaken view since clearly the assignments in both the Appellate and Supreme Courts below are broad enough to cover that defense. (R. 3, 224.)

That it was made an issue in the case is shown by the instructions (R. 219) and, while the argument for petitioner made in the Appellate Court does not appear in the record, the defense of assumption of risk was pressed in the petition for writ of certiorari presented to the Supreme Court of Illinois. (R. 23-25.)

Furthermore, under the facts here, saying that the employe assumed the risk is but another way of saying the petitioner was not negligent.

Missouri Pac. R. Co. v. *Aeby,* 275 U. S. 426, 430;
Tuttle v. *Detroit, etc. R. Co.,* 122 U. S. 189, 195.
See: 3 Labatt's Master & Servant (2nd Ed.), p. 3094; also pages 2487-2488.

And the same result is brought about by considering the plaintiff's act as negligence which, under the facts here, may be considered "as the sole and direct cause of

the accident." *Atlantic Coast Line R. R.* v. *Davis*, —— U. S. ——, No. 70, October Term, 1928, decided February 18, 1929.

(2)

The making of a "Flying Switch" was not negligence as to Mihas.

The Appellate Court intimates, rather than decides, that the making of the "flying switch" by the trainmen was a negligent act of which Mihas could complain.

No notice or warning of the switching movement being required, the only relevance of the method of switching concerns the violence of the resulting impact upon the standing cars. It is true the Appellate Court found that the shunted cars "must have proceeded over the track on the team track at a considerable speed so that they struck the standing cars with a great deal more force than was requisite under the circumstances" (R. 10)—but there was no finding that this was the proximate cause of the injury to Mihas nor was liability predicated in anyway thereon.

While there was evidence that the impact of the moving upon the standing cars was severe enough to drive the standing cars forward a distance of three or four car lengths (R. 71, 80) there was also evidence that the cars were shunted in at a speed of four or five miles an hour—the usual speed in making a switching movement of that character (R. 177, 196, 198). There was no evidence that the mere added violence of the impact was the proximate cause of the injury to Mihas. At best this is a mere speculation or conjecture which is insufficient. *Chicago, etc. R. Co.* v. *Coogan*, 271 U. S. 472.

If it be conceded, however, that the cars went in on the team track at a speed sufficient to strike the standing cars

with more force than was reasonably requisite and that the mere added violence of the impact thus occasioned was the proximate cause of the plaintiff's injury, these facts would not of themselves constitute negligence. Mihas was in a place where he had no right to be and his presence there was unknown and unsuspected.

In *St. Louis, K. C. & C. R. Co.* v. *Conway,* 156 Fed. 234 (C. C. A. 8th), it was held (quoting from syllabus):

> "An act, which caused an injury to another not foreseen, and which could not reasonably have been anticipated, does not give a right of recovery for such injury on the ground of negligence; and a railroad company cannot be held liable for an injury to a brakeman who was riding on the pilot of the first of two engines coupled together, where he had no right to be, conceding as claimed, that it was caused by the act of the engineer of the rear engine in starting his engine suddenly and causing it to jar the one in front; such engineer having no knowledge of the brakeman's position on the pilot."

After discussing the evidence and citing authorities, the court said, on page 239:

> "With such reiteration that the necessity of repeating it almost excites impatience, the courts have asserted, and consistently held, that when the servant, of his own volition and for his own convenience, assumes a dangerous position, not intended by the master, in which to perform his work, he is without just complaint against the master if injury thus come to him."

See *Gulf, etc. R. R.* v. *Wells,* 275 U. S. 455, 459.

See also *Hinson* v. *Atlantic, etc. R. Co.,* 172 N. C. 646, 90 S. E. 772.

Nor, in any other respect, is there any warrant for the

conclusion that the so-called "flying switch," as made here, was a negligent operation as far as the plaintiff was concerned.

Toledo, St. L. & W. R. Co. v. *Allen,* 48 Sup. Ct. 215, *supra;*

Lord v. *Boston, etc. R. Co.* (N. H.), 65 Atl. 111.

(3)

Even if there were a duty to give notice or warning of the switching operation to those differently situated from Mihas, a breach of that duty was not as to him actionable.

The Appellate Court stated in its opinion (R. 9) that the evidence showed:

> "* * * it was the uniform custom to notify persons unloading at this point whenever the defendant was about to run cars in and upon said track."

The point upon which the case turned in the lower courts was that this custom enured to the benefit of Mihas, although he was not within the class of persons intended to be protected thereby (R. 10, 11, 12).

Even if it were true that, under the evidence, there was a duty to the men unloading cars to give notice or warning to them of the switching operation, which is not believed to be the case, since these men had finished unloading and were leaving the premises (R. 57, 70, 75, 101, 112, 113)—under applicable decisions of this honorable court, a breach of that duty resulting in an injury to an employe such as here would not as to him be actionable.

St. L. and San Fran. R. R. v. *Conarty,* 238 U. S. 243, 249;

Chesapeake and Ohio R. Co. v. *Nixon,* 271 U. S. 218, 220;

The Eugene F. Moran, 212 U. S. 466, 476.
See also: *Cincinnati, etc. R. Co.* v. *Swann*, 160 Ky. 458, 169 S. W. 886;
Williams v. *Chicago, etc. R. Co.*, 135 Ill. 491;
Lord v. *Boston, etc. R. Co.*, 65 Atl. 111, *supra*.

The Appellate Court of Illinois, in its opinion, apparently announces a doctrine in contravention of this principle and relies upon certain Illinois cases in support of it.

In view of the decision in the case of *Williams* v. *Chicago, etc. R. Co.*, 135 Ill. 491, *supra* (one of the cases cited in the opinion in the *Conarty case*), it may well be doubted if the Illinois doctrine, in this respect, previously announced, was in anywise different from the Federal rule on the subject. However that may be, it is clear that the Federal rule governs here.

Central Vermont R. Co. v. *White*, 238 U. S. 507;
New Orleans & N. E. R. Co. v. *Harris*, 247 U. S. 367;
The Western Atlantic R. Co. v. *Hughes*, —— U. S. ——, No. 234, October Term, 1928, decided Feb. 18, 1929.

The challenged evidence should not have been admitted, nor should potency have been given it as evidence tending to show negligence.

For the reasons stated and upon the authorities cited, it is respectfully submitted that the judgment of the Appellate Court of Illinois, First District, and/or the Supreme Court of Illinois, should be reversed.

DAVID H. LEAKE,
WILLIAM G. WISE,
Counsel for Petitioner.

APPENDIX

Paragraphs 120 and 121, Sections 121 and 122, Chapter 110, Cahill's Revised Statutes of Illinois, 1927.

"¶ 120. Appeal from Appellate to Supreme Court—Final judgment.] § 121. In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court: And, provided, also that application under this Act to the Supreme Court to cause it to require a case to be certified to it for its review and determination shall be made on or before twenty (20) days before the first day of the succeding term of said Supreme Court:

Provided, fifty (50) days shall have intervened between the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, and the first day of such succeeding term of said court. But if less than fifty (50) days shall have intervened as aforesaid, then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court succeeding the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist.

"Whenever judgment has been rendered in any of the said Appellate Courts, the Appellate Court so rendering judgment shall have power to stay the issuing of any mandate until the time for filing a petition in the Supreme Court for a writ of certiorari shall have expired without any such petition having been filed, or if such petition for said writ shall have been filed within the proper time, the Appellate Court so rendering judgment shall have power to stay the issuing of any mandate until said writ of certiorari shall have been granted or refused. Whenever said writ of certiorari shall have been granted, the issuing or enforcement of any mandate of the Appellate Court pursuant to its judgment, or of any judgment entered in any court or standing affirmed in any court pursuant to the mandate of the Appellate Court, shall be stayed without further order by the Supreme Court, until the final disposition of the case by the Supreme Court."

"¶ 121. Supreme Court—To pass only on law—Exceptions.] § 122. The Supreme Court shall re-examine cases brought to it by appeal or writ of certiorari as provided in this Act, from the Appellate Courts, as to questions of law only; and in the cases aforesaid, no assignment of error shall be allowed calling in question the determination of the inferior or appellate courts upon controverted questions of fact therein."